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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 122.

LILLEY CORNETT, - - - - - - - Petitioner,

versus

SWIFT COAL & TIMBER COMPANY, ET AL., - Respondents.

BRIEF FOR RESPONDENT, SWIFT COAL & TIMBER COMPANY, IN OPPOSITION.

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v.

SWIFT COAL & TIMBER COMPANY, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT, SWIFT COAL & TIMBER COMPANY, IN OPPOSITION.

May it please the Court:

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Kentucky is found on page 2 of the Record, and the Memorandum Opinion of the Circuit Court of Appeals is found on page 45 of the Record.

JURISDICTION.

Jurisdiction is invoked under U. S. C. A., Section 240(a).

QUESTIONS PRESENTED.

According to the petition (Paragraph XVII), the only questions presented would appear to be such as result from the lower court's refusal, as petitioner says, "to follow the law of Kentucky with reference to

"(a) The rights of prior lien holders;
(b) Jurisdictional validity of attachment proceedings; and
(c) Culpable laches."

Ignoring the informality of such attempted compliance with the rule requiring statement of questions presented, we assume that such questions might be stated by him as follows:

(a) The Court erred in holding that the petitioner merely acquired by virtue of his purchase at tax sale a prior and superior lien for the amount of his purchase price and interest, and that the attachment lien of Swift Coal & Timber Company, although it accrued after the assessment prior to the tax sale, was not extinguished but was simply subordinate to the lien of the tax purchaser, it being the contention of petitioner that the tax sale had the effect of extinguishing such attachment lien and vesting the purchaser with a fee simple and unencumbered title to the land.

(b) That the attachment proceedings of Swift were void for failure to comply with provisions of the Kentucky Code; and

(c) That owing to laches of Swift in enforcing its claim, it is now precluded from doing so.

Attention is called to the fact that in petitioner's brief filed in support of his petition question (c) is not argued. That is, no doubt, due to the complete answer to such charge of laches shown in the Record to the effect that the delay was due to the pendency of other litigation involving the same property between Cornett and other attaching creditors with whom Swift had made a compromise agreement and which, the District Court held, satisfactorily explained and necessitated the delay. See Record, pages 3, 37, 38 and 39.

It may be further noted that in such supporting brief for petitioner, argument is made on another question based on contention that the lower court by its refusal to follow and apply the laws of Kentucky deprived petitioner of property without due process of law contrary to the Fifth Amendment to the Constitution of the United States. Overlooking the novelty and insufficiency of such ground, thus broadly and vaguely stated, which is not supported by citation of authorities, it is assumed that the Court will not consider any other grounds than those mentioned in the petition, according to its rules and repeated decisions, and no further attention will be given to such question.

STATEMENT OF FACTS.

Supplementing the statement of petitioner, attention is called to the fact that said petitioner claims to be the owner in fee of the property involved in the case by virtue of a sheriff's sale for taxes held March 7, 1932, at which he purchased the property for $94.62. Swift had on July 23, 1930, prior to such sale, levied on the property an attachment for $23,000.00. Swift claimed to be a creditor of American Column & Lumber Company, which had the legal title to the property, in an amount in excess of $200,000.00 and had, moreover, contributed $11,760.50 to the purchase price of said lands.

In the District Court abundant evidence was introduced by Swift in support of its contention that the proceedings on which the tax deed was based were insufficient to pass title to the land or to do more than afford the purchaser a lien thereon for the amount of taxes paid by him, such deficiencies being—

(a) Insufficient description of land;
(b) Variance between the tax deed and prior proceedings; and
(c) Failure of sheriff to notify taxpayer, as required by Kentucky Statutes, Section 4149.

The District Court did not find it necessary to decide whether or not the proceedings were sufficient to pass good title to the land since it found that, according to Kentucky law the property being subject to the attachment lien of Swift, the sale for taxes did not oper-

ate to extinguish such lien, but gave to the purchaser a prior lien on the property for the amount of taxes paid by him.

The Circuit Court of Appeals, being thoroughly satisfied of the correctness of said ruling affording petitioner such prior lien and giving him all that he was entitled to, whether or not such proceedings were entirely regular, affirmed such ruling, no doubt deeming it unnecessary to render a labored or extensive opinion on such a clear proposition.

ARGUMENT.

It will be argued in opposition to the petition as follows, viz.:

1. The lower court correctly and strictly applied and adhered to the Kentucky law in deciding that the effect of the tax sale in question was merely to pass to the purchaser such title as the delinquent taxpayer had at the time of such sale, and which was subject to the then existing attachment lien of Swift, giving, however, to such purchaser a superior lien for the amount paid by him, plus interest at the rate prescribed by statute.

2. The attachment lien of Swift was not void for alleged failure to comply with procedural requirements of Kentucky Code, Section 196.

3. The case of Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127, upon which petitioner apparently relies, has no application here.

I.

Assuming (Without Admitting) Entire Regularity of Proceedings to Support Tax Sale to Cornett, He Took Title Subject to Attachment Lien Which Was in Existence at Time of the Sale.

This is the ground upon which the judgment of the District Court was based, and upon which the Circuit Court was content to rest its affirmance.

The petitioner, however, contends in effect that the tax sale created in the purchaser a new title relating back to the date of assessment, rather than the date of sale, or even than the date of the levy required by the Statute (Section 4149) and extinguishes all liens or claims created subsequent to the assessment date.

This contention is not in accordance with Kentucky Statutes or decisions of its Court of Appeals, but is directly in their teeth.

The Kentucky law is well stated in Hall v. Hall, 174 Ky. 356, 192 S. W. 76, where the Court, at page 360 of the official report, says:

> "It must be conceded that the statute makes the lien for taxes paramount to all other existing liens and incumbrances, and that following a sale of real estate for the tax collectible thereon, and the failure of the owner to redeem the same within the two years allowed by law, a deed from the sheriff to the purchaser of the property at the tax sale vests in the latter what the statute declares a fee-simple title. But after all, the title so acquired is just such as the person against whom it was as-

sessed had. We have repeatedly held that the purchaser at a tax sale acquires only the title of the person against whom the land was assessed. Rogers v. McAlister, 151 Ky. 488, 152 S. W. 571; Eastern Ky. Coal Lands Corporation v. Commonwealth, 127 Ky. 700, 106 S. W. 260, 108 S. W. 1138, 32 Ky. Law Rep. 129, 33 Ky. Law Rep. 49. So the effect to be given a tax deed depends upon the construction that must be given the Kentucky Statutes authorizing the sale of lands for taxes, as the power to sell for taxes is purely statutory, and since, as already stated, the statutes of the state do not create in the purchaser at a tax sale a new title originating in the state and created by the tax sale, but authorize merely the transfer to the purchaser at the tax sale the title owned by the party against whom the assessment was made, it would be as inequitable to allow the title acquired by the purchaser at the tax sale under the deed from the sheriff to defeat a bona fide existing, prior lien upon the property as to permit it to be done by a purchaser under a deed from the former owner against whom the tax assessment was made. The statute does not declare in terms that the purchaser by virtue of the tax sale and deed from the sheriff shall take the land free of existing liens. Such a meaning to the statute could only be arrived at by inference, and such inference is not justified by its language or spirit. It is true section 4032 permits any person having a lien upon real estate to pay the taxes if the owner has failed to so do, and to be subrogated to the lien of the commonwealth, county, or district for such taxes; but this right is doubtless accorded as a means by which the lien holder may protect himself against

the paramount lien that would be acquired on the land by a purchaser thereof at its sale for the taxes. The statute does not, however, declare that the lienholder's failure to avail himself of this right will extinguish his lien if the property be sold for the taxes thereon and conveyed by the sheriff to the purchaser at such sale. The duty to keep the taxes paid upon the property devolves upon the owner. Tax sales are, it is true, advertised by the sheriff before the sale of the property, but this is to give notice to the owner of the property rather than to persons having liens thereon.

"It might with greater propriety be said that the purchaser at the tax sale is charged with the knowledge of a recorded lien *then* existing upon the property. But that fact would not defeat the paramount lien given by the statute for the tax and penalty paid by him in its purchase." (Emphasis ours.)

Attention is called to the word "then" appearing in the last quoted paragraph, as referring to the time of the *tax sale.*

And again (page 361):

"Whatever authority may be found elsewhere sustaining the contrary view, it has not been declared in this state to be the law that a tax sale is to be regarded as creating a new and independent title. On the contrary, we think it more consonant with reason to say that the effect of a tax sale and deed from the sheriff conveying the property to the purchaser at such sale only vests in the latter such title or interest therein as was held and owned by the person in whose name the property was assessed."

The same principles are recognized and affirmed in Smith v. Young, 178 Ky. 376, 198 S. W. 1166; Begley v. Boreing, 221 Ky. 619, 299 S. W. 551; Drane v. Graves, 261 Ky. 787, 88 S. W. (2d) 927; Vaughn v. Metcalf, 274 Ky. 379, 118 S. W. (2d) 727; and no authority will be found to the contrary.

Especial attention is directed to the case of Interstate Bond Co. v. Home Owners Loan Corporation, 282 Ky. 569, 139 S. W. (2d) 69, decided on March 1, 1940, and only recently published in the Kentucky Advance Sheets. This apparently is the latest pronouncement on the subject by the Kentucky Court of Appeals and fully confirms what we have said in this section. We quote from the opinion in this case on page 571 of the official reports:

> "In Drane v. Graves, 261 Ky. 787, 88 S. W. (2d) 927, Faust v. Louisville Trust Co., 192 Ky. 3, 232 S. W. 58, and Hall v. Hall, 174 Ky. 356, 192 S. W. 76, it is held that a tax deed executed at the end of the two-year redemption period as provided in Kentucky Statutes, section 3004, does not wipe out a mortgage lien. The substance of those decisions was that the holder of the tax deed takes a fee simple title to the property, *subject to existing mortgage liens,* which liens are in turn subordinate to the paramount lien given the holder of the tax deed to the property for the amount of the tax, statutory penalties and interest paid by the holder therefor. We do not deem it necessary to decide whether or not a mortgagee has a right to redeem property as against a tax purchaser to whom a tax deed has been executed at the end of

the two-year redemption period since HOLC is not seeking to redeem but is only seeking to assert its mortgage lien which it has a right to do under the authorities cited above. As a matter of fact, HOLC in its pleadings nowhere claimed a right to redeem the property and Interstate by its answer and cross petition prayed to be adjudged the owner of the fee simple title under its tax deed. Further, the two-year period allowed for redemption had passed and a tax deed for the property was held by Interstate." (Emphasis ours.)

In Paragraph VIII of the Petition for Certiorari it is said that the lower courts, "refusing to follow and apply the law of Kentucky held that the only right which petitioner had was a paramount lien against the lands to reimburse him for the amount he had paid the Sheriff of Letcher County when he purchased at the tax sale and held that this lien was not superior to the lien of Swift, although the lien of Swift was acquired twenty-two days after the tax lien had attached to these lands." The same contention is made in the Supporting Brief, page 12.

It was not held that Swift's lien was superior to Cornett's but the latter was held to be superior. Nor was Cornett limited to his lien for his purchase price, but he was adjudged to have title subject to Swift's lien.

Petitioner ignores the fact that the tax sale was made pursuant to a levy after delinquency, under Kentucky Statutes 4149, as under execution; also the fact

that while the assessment is made as of, and relating back to July 1st, it was actually not made until late in October, and until such later date there was no lien for the taxes.

He also overlooks the fact that such a tax sale does not extinguish other liens on the property. None of his cited cases supports the contention that liens existing at the time of sale, although created after the assessment date, are *extinguished* by the sale, and it is submitted that none can be found.

It is the general rule, and the rule in Kentucky, that in proceedings to enforce a prior lien, to which the holder of a junior lien is not made a party, such junior lien is not extinguished but the holder may still have relief, redeeming from such sale, etc. Com. v. Robinson, 96 Ky. 553, 29 S. W. 306; Gault v. Equitable Trust Co., 100 Ky. 578, 38 S. W. 1065.

Of course, if the junior lienholder is a party to the proceedings his lien is extinguished by a proper sale to enforce the prior lien. It is clearly recognized, however, that a sale for taxes in Kentucky, being summary and *ex parte* does not have such effect, as is shown by the following excerpt from Drane v. Graves, 261 Ky. 787, 793, 88 S. W. (2d) 927, viz.:

> "* * * a sale of property for the purpose of enforcing tax liens was never regarded as a proper proceeding for the enforcement of prior contractual liens upon the same property, and the purchaser at the sale of property so encumbered took it subject to the lien of such encumbrance but with

a prior lien for the amount he had paid with interest, penalties," etc.

To the same effect is Faust v. Louisville Trust Company, 192 Ky. 3, 232 S. W. 58.

II.

The Attachment Lien of Swift Was Not Void for Alleged Failure to Comply With Procedural Requirements of Kentucky Code, Section 196.

Section 196, of the Kentucky Code, requires that for an order of attachment to be made by the Clerk an affidavit containing certain statements must be filed. It was long ago decided in Kentucky and is still the rule that it is unnecessary to file a separate affidavit if the statements are made in the petition and the petition is verified. Scott v. Doneghy, 17 B. Mon. 321; Franklin Savings Inst. v. Bank of Wheeling, 1 Metc. 156; Worthington v. Carey, 1 Metc. 470; Burnam v. Romans, 2 Bush, 191.

Out of an abundance of precaution in the present case, both of the above methods were used. The affidavit is copied in full in the Record on pages 26 and 27, and the Amended Bill in Equity is so copied on pages 27 and 28. We submit that the Amended Bill, as verified, by itself alone, meets every requirement prescribed by the Kentucky Code, and when the two instruments are read together it is difficult to see how anything further could be added.

Petitioner contends that neither the affidavit nor Amended Bill complies with the requirement of the Code that there shall be shown "the sum which the affiant believes the plaintiff ought to recover" (Petition, Paragraph X, page 4; Brief for Petitioner, page 13).

In the Amended Bill it is said (Record 28) "the plaintiff ought to recover a sum greatly in excess of the value of the defendant's property in this state, to-wit: at least $204,552.39, but the plaintiff asks an attachment herein upon only $23,000.00 of its claim," etc.

In the jurat it is stated that the affiant "believes the facts alleged in the foregoing amended bill in equity are true." This was properly held to be a substantial compliance with the requirements of the Code.

Thus we find a positive statement in the body of the pleading, and the "belief" that it is true, stated in the jurat. That such a method of setting out said statement fully complies with the Code provision is settled by the Kentucky decisions.

The case of Colovas v. Allen Motor Co., 242 Ky. 93, 45 S. W. (2d) 809, contains the following statement:

> "The facts necessary to procure an attachment must be charged directly and positively and not on belief or information and belief. Where the affidavit states that the affiant believes the facts therein, but is sworn to as true and not on belief merely, or where the affidavit states the facts directly, and it is sworn to on information and belief, it is in either instance sufficient. Williams v. Martin, 1 Metc. 42; Ryon v. Bean's Admr., 2 Metc. 137."

The law does not require that the exact language of the Code be used. As said in Lincoln Bank & Trust Company v. Arnold, 256 Ky. 80, 75 S. W. (2d) 751:

> "We are not unmindful of the rule that a reasonably strict compliance with the Code must be had relating to attachments and other summary proceedings. But this rule does not mean that the exact words used in the Code must always be resorted to, when there is other language used conveying the same meaning and where the intention and purpose of the parties are obvious."

The request for an attachment on only $23,000.00 is not inconsistent with the requirements of the Code, and would seem to have been dictated by considerations of common sense, as it would have been obviously fruitless to levy an attachment for more than $200,000.00 on property known to be worth less than one-eighth of that sum and unnecessarily burdensome to give the bond which would be required therefor.

None of the cases cited by petitioner supports his claim as to the insufficiency of such allegations, and surely it cannot be said that any of them support his claim that they are so deficient as to affect the jurisdiction of the Court.

Furthermore, no summons was necessary on the Amended Bill or supplementary proceedings for attachment. See Moore's Admr. v. Sheppard, 1 Metc. (Ky.) 97; Fremd v. Ireland (1895), 17 Ky. Law Rep. 1140, 33 S. W. 89.

III.

The Case of Cornett v. Greever, Et Al., 272 Ky. 241, 113 S. W. (2d) 1127, Has No Application Here.

In the petition for certiorari (Paragraph VII) it is said that the validity of the tax deed was before the Kentucky Court of Appeals in the above case, "and was there upheld as a valid conveyance to Cornett of the fee simple title to these lands." None of these respondents was party to or bound by said decision, and the evidence there adduced was in material respects different from that in this case (Record, pages 13, 31, 32). That case was a controversy between Cornett and certain attaching creditors who had obtained a commissioner's deed. The Court found their attachments, and consequently their deed, void (on grounds other than those charged by petitioner herein) and there being no other claimants of the property before the Court it had no jurisdiction to adjudge anything further, and anything it said on this point was clearly *obiter*.

As stated in brief for petitioner (page 19) the question of the effect of the tax sale on an existing lien on the land was not discussed in the opinion, but it will be noted that when the Court of Appeals of Kentucky first decided that case in favor of such attaching creditors (which decision was later withdrawn on rehearing), it held in accordance with Hall v. Hall (*supra*) that the tax title was subject to the attachment liens, with superior lien in the purchaser to the extent of

taxes and costs paid by him (Record, page 31); and its second and final opinion held nothing to the contrary.

Under such circumstances, the opinion in that case has not even the effect of *stare decisis* in this case.

CONCLUSION.

It is submitted that the decision of the Circuit Court is proper and that no reasonable ground exists for the review sought.

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